



The Office of Vince Ryan
County Attorney

July 15, 2014

Ms. Anne Foster
United States Environmental Protection Agency
1445 Ross Avenue
Dallas, Texas 75202

Re: San Jacinto Superfund Site

Dear Ms. Foster:

Harris County has recently identified critical information regarding the San Jacinto Superfund Site that it is providing to the Environmental Protection Agency consistent with the Memorandum of Understanding between EPA and Harris County. Because of the seriousness of the issues discovered, Harris County requests that EPA retain an independent third party to conduct a formal investigation into the recent revelation that the site work that formed the basis for the supposedly unbiased "scientific" reports turned into the Government was actually part of the litigation strategy to protect the interest of the responsible parties – not the public's interests.

I. EPA cannot evaluate or select a site remedy based upon the responsible party's litigation strategy.

The attached affidavits signed by the responsible parties' attorneys reveal -- apparently for the first time -- that their consultants Anchor and Integral (who conducted and assisted with what is required to be an unbiased and impartial RI/FS at the Site) were actually retained as part of the responsible parties' legal strategy and to assist with their defense. Documents obtained by Harris County also show that site work, studies and underlying information for key reports submitted by Anchor, Integral, International Paper, Waste Management and MIMC to the government as the basis for evaluating remedial alternatives at the Site were actually prepared as part of the responsible parties' legal defense and litigation strategy. Because the responsible parties have now conceded that their site work underlying these key reports was part of the PRPs' litigation strategy done in anticipation of litigation, then it cannot have been done as part of an independent, unbiased investigation and study that is required by law for the San Jacinto Site. The information also brings to light an insurmountable conflict of interest presented by having the responsible parties' consultants -- now identified as having been retained as part of their defense strategy -- also prepare the supposedly independent reports that the EPA and public are being asked to rely on to evaluate site risks and remedies.

The depth and degree of the now-identified conflict of interest of the responsible parties' litigation consultants have been starkly exposed in recent depositions where those purported authors of key site work and reports refuse to answer basic questions about their impartiality or to identify who actually wrote and contributed to the reports submitted to the government. The PRPs have also refused to reveal to the public more than 45,000 documents underlying and/or forming the basis of the conclusions of the Feasibility Study, claiming in their privilege logs that information related to the site remediation work is part of its litigation strategy and defense.

EPA's third-party investigation should also address the responsible parties' claims that they can somehow withhold from the public the many thousands of documents they seek to conceal that relate to the basis and conclusions of the Feasibility Study. As a matter of law, all of the work undertaken in connection with the RI/FS is public and cannot be hidden from the public. EPA should require this information to be brought out into the open so that the public can see what portion of the site remediation work was done to promote and further the responsible parties' legal strategy as identified in their own privilege log.

II. International Paper and MIMC now admit that the work underlying the Feasibility Study and site reports prepared by Anchor and Integral are actually part of the responsible parties' legal strategy to defend against their liability at the Site.

International Paper and MIMC have recently admitted that work related to the site remediation and Feasibility Study – which it submitted to EPA – was actually prepared as part of the legal strategy of the responsible parties. International Paper makes this admission as part of its efforts to suppress from the public more than 45,000 documents related to the site work that are the basis and underlying backup for the Feasibility Study, as shown in their attached 3,886-page privilege log identifying site-related documents they refuse to make public.¹ To support their efforts to withhold documents, the in-house attorneys for International Paper and MIMC have executed affidavits swearing under oath that consultants Anchor and Integral who conducted and assisted with the RI/FS work at the Site had actually been retained as part of the responsible parties' legal strategy associated with the Site.²

¹ See attached copy of International Paper's 3,886 page log of the thousands and thousands of site-related work documents it refuses to reveal to the public in connection with the San Jacinto site work and the Feasibility Study. The responsible parties take the position that all of this work was done as part of its joint defense strategy, as part of its communications with its attorneys, and/or is confidential because it is part of the responsible parties' litigation strategy. International Paper's broad attempts to use privilege to withhold many thousands of relevant site documents appears to extend to virtually every document that was authored by a consultant regarding site remediation issues, even including documents from analytical testing labs that they attempt to withhold, despite the fact that underlying facts and test results cannot be withheld from disclosure.

² International Paper's in-house attorney Elton L. Parker has provided the attached Affidavit in which he swears under oath that Integral was retained in 2009 to facilitate the rendition of professional legal services to International Paper and that communications with Integral occurred to carry out the instructions of counsel in anticipation of litigation, among other things. MIMC's in-house attorney Francis E. Chin has provided the attached Affidavit in which he swears under oath that from at least 2008 MIMC's communications with Anchor were to facilitate to rendition of professional legal services to MIMC in connection with the San Jacinto Superfund Site and, since 2009, to jointly provide consulting services to attorneys for both MIMC and International Paper. Mr. Chin swears under oath that the engagement of Anchor from October 2008 to the present has been necessary to assist MIMC's attorneys with providing effective representation to MIMC.

Because the PRPs are claiming that the documents that form the basis of and/or relate to reports authored by Anchor and Integral are privileged because they were done to defend the PRPs' position in litigation, their own admission proves that the reports provided to EPA are not independent and unbiased reports that the law requires them to be and cannot be the basis for EPA to utilize to make decisions about public health and welfare.

At this point, EPA and the public now find themselves in an untenable position where they are being asked to rely on a Feasibility Study where the underlying work is admittedly done as part of defending the responsible parties' interests – not the public's interest. Even more concerning, the responsible parties take the position that the public cannot even see the underlying basis for the conclusions of the Feasibility Study, but that they get to keep that information secret as part of their defense strategy. International Paper's withholding of relevant information regarding the motives and underlying basis for the Feasibility Study renders the public comment process invalid at the outset, since the public cannot comment on what it cannot see.

The law does not allow responsible parties to withhold information prepared as part of the RI/FS process from the public or from the government.³ The work pertaining to the RI/FS cannot be hidden from the public on the basis that the responsible parties did the work as part of their defense strategy; on the contrary, the RI/FS process is not allowed to be biased or undertaken to protect a responsible party's litigation interests. All information regarding the site work must be transparent and is required by law to be made available. EPA's third-party investigation should require this information to be provided to the public.

III. The Consultants who prepared the reports to the government have inherent conflicts of interest because the PRPs have now admitted that Anchor and Integral were actually hired as part of their defense against anticipated litigation and to protect the responsible parties' interests in connection with the Site.

A. Consultants conducting or assisting with RI/FS work cannot have a conflict of interest.

If responsible parties use consultants for conducting or assisting with the RI/FS – such as Anchor and Integral in this case – the consultants cannot have a conflict of interest with respect to the project.⁴ In an effort to prevent the public from obtaining documents regarding the site

³ All of the work undertaken in connection with the RI/FS is public and cannot be hidden from the public as a matter of law. The Unilateral Order requiring the responsible parties to undertake the very work they now seek to hide makes it clear that all records and documents in their possession that relate in any way to the Site shall be preserved, including requiring the responsible parties to acquire and retain all documents relating to the Site in the possession of its attorneys and others. *See* Unilateral Administrative Order, XX. Record Preservation. EPA's third-party investigation should also address the responsible parties' claims that they can withhold this information from the public in contravention of the requirements of the [date] Unilateral Administrative Order.

⁴ "Revisions to the Interim Guidance on PRP Participation in Remedial Investigations and Feasibility Studies," (OSWER 9835.2a, February 1989) at A-13 – A-15 ("EPA Guidance").

work that were authored by Anchor and Integral as part of the RI/FS process, the responsible parties' attorneys have now admitted that Anchor and Integral's work was actually done to defend and protect them in connection with litigation. They executed the attached affidavits to support their positions that Anchor and Integral were hired to assist in the responsible parties' defense in connection with the Site, and they claim that Anchor and Integral's work in connection with the RI/FS and site remediation issues can be concealed from the public because it is actually part of their legal defense against liability.

It is an inherent conflict of interest to allow the responsible parties' consultants – whose actual assignment was to assist in the responsible parties' defense from liability at the Site – to undertake the site work and prepare reports that are required to be impartial and independent. Consultants cannot be retained as part of the responsible parties' litigation strategy team and then held out as supposedly independent consultants to prepare critical site reports that impact defendants' liability. Harris County has not been able to locate any evidence that the responsible parties revealed this information to EPA when they chose Anchor and Integral to be their consultants in preparing the supposedly unbiased and independent studies that were to study the site and identify potential alternatives.

The responsible parties have a vested financial interest in whatever remedy is ultimately selected by EPA; accordingly, the consultants undertaking the site investigation, study work and preparation of the reports identifying the potential alternatives to be considered must be independent and unbiased. In this case, the consultants preparing the reports that will impact the responsible parties financially are the very consultants that the responsible parties retained and paid to protect their interests in connection with litigation and liability at the Site. EPA is already in possession of the email evidence showing that as early as 2011 and well before the studies required by law were conducted, Waste Management and International Paper had already begun their "global plan" to influence the community to promote their pre-selected cheapest remedy of leaving the waste in place under rocks, including actively using David Keith -- their consultant at Anchor -- to "control" the public's perception and avoid the ultimate selection of a removal remedy.⁵ The EPA and the community were not informed of this covert plan, which was only uncovered when emails discussing the responsible parties' plans for their preferred remedy were recently obtained. This most recent information showing that Anchor's work at the site was actually part of the responsible parties' defense strategy raises additional, even more serious questions about the objectivity of the underlying reports and information being provided to EPA and the public by Waste Management, International Paper, MIMC, Anchor and Integral.

⁵ See attached March 9, 2011 emails from and to Waste Management's Director of Closed Sites to International Paper Company's Senior Environmental Remediation Project Manager and the District Manager of Waste Management's Closed Sites Management Group discussing work on what they called a "global plan" to build consensus with the community action group members "to view the TCRA [temporary rock cap] as part of the permanent remediation action at the site." Those same emails discuss Waste Management's position that "we need to control our message and build consensus [are] we may be facing a dig and haul/burn as part of the final remedy." Their emails also discussed the need to have their consultant from Anchor Environmental -- one of the consultants who authored the Feasibility Study report submitted to EPA -- present at the community meetings "to control our message," noting that the EPA project manager "will not speak out of turn when the Anchor representative is present because he knows he will be called out immediately."

- B. The inherent conflict of interest of consultants Anchor and Integral is illustrated by their refusal to answer questions under oath regarding how the reports were prepared, who authored them, whether they agree with their own reports, and whether they are acting as advocates for the responsible parties when producing such reports.**

The public and EPA are being asked to base their decisions regarding the risks to the environment and public health on studies and reports "prepared by" Anchor and Integral. However, Anchor and Integral now refuse to answer even the most basic questions about how they came to the conclusions in the relevant reports, such as who actually wrote, edited, or contributed to their reports, whether they agree with their own reports, whether they were unbiased or were in fact acting as advocates of the responsible parties who paid them, and even whether their reports were written in whole or part by the attorneys for the responsible parties as part of their litigation strategy.

The public is entitled to know who actually wrote the reports they are being asked to comment on and rely upon with regard to risks to themselves and the environment. The public is entitled to know whether the consultants identified as preparing the reports agree with their own conclusions and, if not, which ones they do not agree with. The public is entitled to know if the consultants preparing the report are acting as advocates for the interests of the responsible parties paying them or whether they are impartial. The public is entitled to know if the consultants preparing the report have been retained, as Anchor and Integral admittedly have been, as part of the responsible parties' legal strategy to protect them against liability, as opposed to being impartial consultants. The public is entitled to know that 45,000 Anchor and Integral documents relating to the site and forming the basis of the Feasibility Study have been withheld as secret information that the responsible parties refuse to let the public see.

The depth and degree of Anchor and Integral's conflict of interest has been exposed in recent depositions (excerpts attached), when the purported authors of the key site work and reports admitted the following:

- They do not necessarily agree with all of the information contained in the reports they prepared and submitted to the government.
- They would not answer any questions about any input, edits, changes, or deletions that attorneys for the PRPs made to their reports, providing a privilege log that contains 3,886 pages and over 45,000 documents and communications they claim are privileged and do not have to be revealed to the public.
- They could not identify who wrote portions of the reports and would not reveal the identity and names of all persons who contributed to the reports.
- Integral's project manager went so far as to refuse to answer a question on whether she was an independent scientist or advocate for her clients (International Paper and MIMC) in performing work at the Site.

Anchor and Integral's own testimony under oath highlights the inherent conflict of interest in which they find themselves, as they simply refuse to answer basic questions about their impartiality. The public is entitled to know the truth about the basis for the work at the site and the reports that identify alternatives, and whether or not they are impartial. The fact that Anchor and Integral will not answer – or are instructed not to answer – those basic questions about a public process only highlights the need for an investigation to find out why.

The public is entitled to know why what is supposed to be an impartial and independent Feasibility Study identifying alternatives and potential risks did not and/or does not mention the very components that weigh most heavily against the pre-determined leave-in-place cap remedy that the responsible parties are touting. The most obvious of omissions and deficiencies in the Feasibility Study reports were the failure to take into account the obvious impact of hurricanes, storms, tidal influence, and flooding – just to name a few – that weigh against the remedy that the responsible parties are advocating to the public. The public has nevertheless begun to see beyond the version of the Feasibility Study being promoted by the responsible parties and their litigation consultants to identify these fatal flaws, with the Houston Chronicle newspaper recently publishing the attached June 29, 2014 editorial noting that “[C]ommon sense tells us that moving water poses a threat to any cap no matter how well-constructed” and that “the San Jacinto waste site is an extremely vulnerable site” ... “Our area, as we all know, is prone to hurricanes and heavy flooding.”⁶

The responsible parties' omissions and/or minimization of obvious risks and impacts from floods and storms in the Feasibility Study report are also highlighted in a recent 2014 report by the Center for Texas Beaches and Shores – Texas A&M University Galveston, entitled “A Flood Risk Assessment of the San Jacinto River Waste Pit Superfund Site.” (copy attached). The Texas A&M Study documents that existing reports only superficially address the flood risk associated with the site and do not consider the impact of previous events, changing risk conditions, or potential wave action from storm surges. The A&M Report notes the vulnerability of the population in the study area near the site, singling out nursing infants and children under 5 in the area as being particularly vulnerable to dioxin left in the environment. Another particular concern of the in-place remedy being promoted by the responsible parties is A&M University's findings regarding the potential dioxin exposure to nearly 600,000 residents from nearby drinking water reservoirs that could be impacted by the dioxin as shown by storm scenarios modeled by A&M scientists.

The fact that Harris County, the Houston Chronicle, A&M University and others have to point out the obvious flaws and biases of the RI/FS and the remedy being promoted by the responsible parties is telling and highlights the lack of objectiveness of the submissions from the responsible parties' litigation consultants. The new information identified in this letter, along with what has already been identified about the “global plan” of the responsible parties and their litigation consultants (who together control the data collection, interpretation and conclusions of the Feasibility Study and other relevant site work) to influence the outcome, raises serious questions about the integrity of the Study and the work performed at the Site by those parties that cannot be ignored.

⁶ See Houston Chronicle, June 29, 2014 Editorial “Solution now – The San Jacinto Waste Pits were named as a Superfund site for a good reason.”

IV. The new information further indicates that the Feasibility Study work was done in furtherance of the responsible parties' "global plan" to ensure that a removal remedy is *not* selected.

As EPA is already aware, documents have been identified showing that International Paper and Waste Management acted in concert and entered into a "global plan" at least by 2011 to take steps to ensure that the remedy that they wanted -- the cheapest remedy of leaving the waste in place under rocks -- would be the end result of the remedy-selection process -- and to ensure that a removal remedy was *not* selected.⁷ Instead of evaluating objective science, the PRPs and their consultants chose instead to spend their efforts to promote the cheapest remedy that they preferred, discussing their plans to influence the community and avoid having to spend the money to remove the dioxin contamination from the Site. The responsible parties' true motives, as documented in these emails, were not revealed to the public, Harris County, TCEQ, or EPA, even as the responsible parties controlled the Feasibility Study process, interpretation and information. Documents now show that the responsible parties also used those same litigation consultants retained to advance their defense strategy and protect the responsible parties' interests -- not the public's -- to conduct the Feasibility Study process that the responsible parties controlled. The public is entitled to know this background and the responsible parties' admitted motives so they can judge for themselves whether Anchor and Integral's reports are impartial science or an effort to bias the reports to sell the cheapest remedy that evidence shows they had already pre-selected and planned to sell to the public under the guise of supposedly scientific and impartial reports.

The new information from the responsible parties' attorneys identify that Anchor and Integral have insurmountable conflicts of interest between their roles of being retained to participate in the responsible parties' defense strategy and the public's right to an impartial site investigation and Feasibility Study. An independent third-party investigation regarding the integrity of the process must be undertaken to evaluate the objectivity and integrity of the underlying reports and information being provided to EPA and the public that are the basis for future critical decisions regarding public health and exposure.

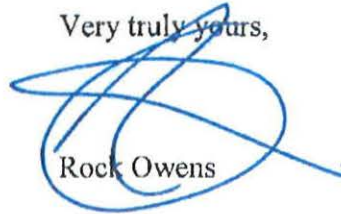
V. Conclusion

Based upon the seriousness of these issues and the potential far-reaching effects that the site work will have on generations of the over 4.0 million people of Harris County, Harris County requests that EPA retain an independent third party to conduct a formal investigation into the serious issues and improprieties that have been revealed in the process.

⁷ See footnote 6.

We look forward to hearing from EPA regarding the implementation of an investigation to ensure the protection of public safety and the environment in connection with the Site.

Very truly yours,



Rock Owens

Cc: Ms. Pamela Phillips (EPA)

Attachments